



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**AMERICAN ASPHALT & GRADING COMPANY v. CMX, L.L.C.
CV-10-0324-PR**

PARTIES:

Petitioner: American Asphalt & Grading Company (“plaintiff”)

Respondent: CMX, L.L.C. and CMX Group, Inc. (“defendants”)

FACTS:

Plaintiff, represented by Lewis and Roca, filed a lawsuit seeking damages against defendants, who filed motions to dismiss and to compel arbitration. The Administrative Office of the Maricopa County Superior Court sent Lewis and Roca a standard “150-day order,” providing:

A Motion to Set and Certificate of Readiness or an Appeal from Arbitration shall be filed on or before 1/20/2009 If Rule 38.1 is not complied with, the case will be placed on Inactive Calendar on the date shown above and it will be dismissed pursuant to Rule 38.1, without further notice, on or after 3/23/2009.

Rules 38.1(d) and (e), Arizona Rules of Civil Procedure, require that the administrator place on the Inactive Calendar every case in which a motion to set and certificate of readiness has not been timely filed and served, and that the administrator “promptly notify counsel in writing of the placing of cases on the Inactive Calendar....”

The trial judge, Judge Buttrick, denied defendants’ motions to dismiss and to compel arbitration. On December 31, 2008, defendants filed their Answer. During this time, plaintiff was finalizing arrangements to substitute Lang Baker & Klain as its counsel. As of the deadline specified in the 150-day order, January 20, 2009, plaintiff’s counsel of record, Lewis and Roca, had not filed the required Motion to Set and Certificate of Readiness. Without further notice to either law firm, the Maricopa County Superior Court placed the case on the Inactive Calendar for dismissal.

On February 5, 2009, the parties stipulated that plaintiff could substitute Lang Baker & Klain for Lewis and Roca. For reasons related to the transfer of the case from Lewis and Roca, Lang Baker & Klain’s docketing system did not include the January 20 deadline for filing the Motion to Set. Accordingly, substitute counsel did not become aware of the impending dismissal and the case was dismissed without prejudice on April 29, 2009.

Lang Baker & Klain immediately filed a motion on behalf of plaintiff to reinstate the action pursuant to Civil Rule 60(c)(1) or (6) or, alternatively, for leave to re-file the complaint pursuant to

A.R.S. §12-504, Arizona’s Savings Statute. Plaintiff asserted that its failure to file a Motion to Set and Certificate of Readiness was inadvertent. Plaintiff alleged that the deadline for filing those applications passed while former and current counsel were transferring the case to current counsel and current counsel was analyzing the complicated factual and technical aspects of the case. In denying plaintiff’s motion, Judge Buttrick stated as follows:

“The pivotal issue to be decided here is whether plaintiff’s failure to heed the Court’s order warning of dismissal constituted ‘excusable neglect.’

On the record before the Court, Plaintiff has not met its burden to show excusable neglect. Instead, it appears that one or both of the law firms who represented it were simply careless. Carelessness does not equate to excusable neglect. *Ulibarri v. Gerstenberger*, 178 Ariz. 151 (App. 1993). Rule 60(c) relief is denied.

Similarly, Plaintiff’s request for relief under the savings statute, Ariz. Rev. Stat. §12-504, is denied. Again, excusable neglect has not been shown. *Jepson v. New*, 164 Ariz. 265 (1990) (adopting the excusable neglect standard for Ariz. Rev. Stat. §12-504 relief articulated on [sic] *Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187 (App. 1988).

Plaintiff’s Motion to Reinstate is, therefore, denied.”

Plaintiff appealed the denial of relief pursuant to Rule 60(c) and A.R.S §12-504 and the dismissal of the action for lack of prosecution. The Appeals Court affirmed in a Memorandum Decision. The Supreme Court granted plaintiff’s Petition for Review solely as to the first of four presented issues.

ISSUE AS TO WHICH REVIEW WAS GRANTED:

Does the Decision’s affirmance of the trial court’s order dismissing the underlying civil case for lack of prosecution without providing prior written notice that the case had been placed on the Inactive Calendar for dismissal conflict with Ariz. R. Civ. P. 38.1(e), which requires that such notice first be given?

This Summary was prepared by the Arizona Supreme Court Staff Attorneys’ Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum, or other pleading filed in this case.